October 15, 2008

TransCanada Power Marketing Ltd.
110 Turnpike Road – Suite 203
Westborough, MA 01581-2863

Thomas Hwang
tel (508) 599-1440
fax (508) 898-0433
e-mail thomas_hwang@transcanada.com

Massachusetts Department of Energy Resources
100 Cambridge Street
Boston, MA 02110

Re: Comments on Section 32 of Chapter 169 of the Acts of 2008, An Act Relative to Green Communities (the "Green Communities Act") - Amendment of RPS Provisions M.G.L. Chapter 25A, Section 11F

Dear Sir/Madam:

TransCanada Power Marketing Ltd. ("TCPM") is pleased to submit the following comments to the Department of Energy Resources ("Department") with respect to the amended provisions of G.L. Chapter 25A, Section 11F (the "RPS Provisions") under the Green Communities Act. Specifically, our comments address the Department's questions relating to the site-specific environmental standards that should apply to hydroelectric generation facilities ("hydropower") and the quantification of incremental new energy generated from capacity additions or efficiency improvements to hydropower facilities.

TCPM is a competitive supplier of electricity in the Northeast United States and is a licensed electric retail supplier in the states of Massachusetts, Rhode Island, Connecticut, New Hampshire, Maine and New York. TCPM is an indirect wholly owned subsidiary of TransCanada Corporation ("TransCanada"), a leader in the responsible development and reliable operation of North American energy infrastructure, with a network of more than 36,500 miles of pipeline facilities and approximately 355 billion cubic feet of gas storage capacity. As a growing independent power producer, TransCanada owns, controls or is developing approximately 10,900 megawatts of power generation in Canada and the United States.

RPS Provisions - Class I

Under Subsection 11F(c) of the RPS Provisions, hydropower can qualify as a Class I renewable generating source if it *began commercial operation after December 31, 1997, or represents the net increase from incremental new generating capacity after December 31, 1997 at an existing facility.* Further, each hydropower must meet three additional criteria:

1. [it] must meet appropriate and site-specific standards that address adequate and healthy river flows, water quality standards, fish passage and protection measures and mitigation and enhancement opportunities in the impacted watershed as determined by the department in consultation with relevant state and federal agencies having oversight and jurisdiction over hydropower facilities;

2. only energy from new facilities having a capacity up to 25 megawatts or attributable to improvements that incrementally increase capacity or efficiency by up to 25 megawatts at an existing hydroelectric facility shall qualify; and

3. no such facility shall involve pumped storage of water or construction of any new dam or water diversion structure constructed later than January 1, 1998.

The following comments are directed to criteria no.1, which we will refer to as the "*RPS Environmental Standards*," and to the portion of criteria no.2 relating to incremental new energy attributable to capacity additions or efficiency improvements at existing hydropower, which we will refer to as "*Incremental New Energy*".

Comments:

1. *Hydropower that has obtained a Section 401 certification by the applicable state agency should satisfy the RPS Environmental Standards*

All states have the authority to set water quality standards for navigable waters within their jurisdiction under the Clean Water Act[1]. The U.S. Supreme Court in *S.D. Warren* v. *Maine Board of Environmental Protection (2006)*[2] effectively affirmed the role of states to set water quality standards for hydropower facilities and the requirement that federal licensees obtain state water qualification certifications (a "Section 401 certification").

Generally, state water quality standards will outline allowable levels of pollution including, pH, temperature, concentrations of pollutants, and dissolved oxygen, and also outline prohibitions against objectionable odor, color, or turbidity. Further, these standards will also include provisions for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water, while at the same time, taking into consideration the use and value of public water supplies, agricultural and industrial uses.[3]

The Massachusetts Department of Environmental Protection (the "DEP") has adopted its own water quality standards regulations that set out acceptable pollutant levels, narrative prohibitions and beneficial uses designated by the state.[4] The Massachusetts regulations charge the DEP "with the duty and responsibility to protect the public health and enhance the quality and value of the water resources of the Commonwealth" and "to take all action necessary or appropriate to secure to the Commonwealth the benefits of the Clean Water Act…[including] the restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters… [to] designate the most sensitive uses for which the various waters of the Commonwealth shall be enhanced, maintained and protected…[to] prescribe the minimum water quality criteria required to sustain the designated uses."[5]

In the current federal and state regulatory environment, the primary responsibility for setting water quality standards resides with the states. The Section 401 certification is a very broad tool available to states to ensure that all hydropower complies with state standards for *adequate and healthy river flows, water quality standards, fish passage and protection measures and mitigation and enhancement opportunities in the impacted watershed.* Any state conditions would be in addition to any environmental standards imposed by the Federal Energy Regulatory Commission (FERC).

[1] 33 USCA §§ 1251–1387 (also known as the Federal Water Pollution Control Act)
[2] S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843 (2006)
[3] Daniel Pollak, at 9-10, S.D. Warren And The Erosion Of Federal Preeminence In Hydropower Regulation, 34 Ecology Law Quarterly 763 (2007)
[4] 314 CMR 4.00, Massachusetts Surface Water Quality Standards
[5] Id. at s.4.01(4)

TCPM respectfully submits that the Section 401 certification for hydropower should sufficiently satisfy the RPS Environmental Standards. Accordingly, if the DEP has granted a Section 401 certification to any Massachusetts located hydropower, then that hydropower should qualify as a Class I renewable generating source, provided it satisfies all the other Class I criteria. Likewise, if any hydropower located in another state has obtained a Section 401 certification from the appropriate environmental agency of that state, then it too should qualify as a renewable energy generating source.

The use of the Section 401 certification as the basis for determining compliance with the RPS Environmental Standards avoids the necessity of creating new and potentially conflicting environmental standards or guidelines for hydropower. It would also provide the DEP with a clear and expedient mechanism to qualify the environmental standards of hydropower regardless of location, while at the same time being assured that all appropriate and site specific standards have been addressed by the applicable state environmental agency.

2. *The quantification of Incremental New Energy should be calculated using the same method approved by FERC for the Renewable Energy Production Tax Credit*

The Energy Policy Act of 2005 requires FERC to certify the "historic average annual hydropower production" and the "percentage of average annual hydropower production at the facility attributable to the efficiency improvements or additions of capacity" so that hydropower applicants can claim the renewable energy tax credit provided for in the tax code.[6] The recent "bailout plan"[7] enacted in response to the financial market crisis extended this tax credit to December 31, 2010, for various types of renewable energy facilities, including hydropower.

To obtain FERC certification, the applicant is required to submit the historic average annual hydropower production baseline it believes to be appropriate for the facility, along with supporting calculations and water flow data, and information regarding the efficiency upgrade or capacity addition. FERC reviews the information and acts on the certification.[8]

TCPM respectfully submits that if FERC has certified the percentage increase in generation attributable to any capacity addition or efficiency improvement at a facility, then such certified value should be the basis of quantifying Incremental New Energy for qualification as Class I renewable generating source. This affords the Department a federally vetted and expedient mechanism to determine what Incremental New Energy is to receive the benefit of the RPS Provisions. And again, this would avoid having the Department create a new and potentially conflicting Incremental New Energy calculation method, and ensure that the RPS Provisions are implemented and administered in a timely manner.

During the Department's stakeholder forum on September 29, 2008, Mr. Robert Grace of Sustainable Energy Advantage supported the view that a hydropower project's incremental production attributable to capacity additions or efficiency improvements should be determined by establishing a percentage value to apply to the project's total production. In fact, Mr. Grace indicated that this approach is being used in the regulations for the Rhode Island renewable energy

[6] Section 1301 (c) of the Energy Policy Act of 2005

[7] Emergency Economic Stabilization Act of 2008, Energy Improvement and Extension Act of 2008, and Tax Extenders and Alternative Minimum Tax Relief Act of 2008

[8] Renewable Energy Production Tax Credit: Instructions for Requesting Certification of Incremental Hydropower Production Pursuant to the Energy Policy Act of 2005, as updated and posted on FERC's website as of March 2007 (hereinafter, referred to as the "FERC Instructions")

standards[9]. This approach, in our view, will also avoid likely errors that would be introduced if comparisons to historic average generation were used, since variations in hydrologic conditions could significantly skew the results under this approach.

3. *The Department should clarify that the increase in generation attributable to a capacity addition or efficiency improvement should qualify as a Class I renewable energy source*

Subsection 11F(c) states that a Class I renewable energy generating source includes the "net increase from incremental new generating capacity…at an existing facility." The underlined language could be mistakenly construed as meaning that only increased generating capacity at existing hydropower facilities would qualify as Class I. However, if that interpretation were to prevail, then the subsequent language in Subsection 11F(c) which qualifies "incremental new energy from increased capacity or efficiency improvements at existing hydroelectric facilities" would conflict with the first part and be rendered meaningless.

TCPM respectfully submits that the language in the first part of 11F(c) is a simple drafting error and that there is no conflict if one construes it together with the second part of 11F(c) and the intent of the legislature by including both capacity additions and efficiency improvements. As a general rule of statutory interpretation, if there is a reasonable interpretation available that would give effect to all the provisions of the statute and result in the least inconsistency, then that interpretation should prevail.[10]

A reasonable interpretation of Subsection 11F(c) is that *incremental new generation* attributable to capacity additions *or* efficiency improvements should qualify as a Class I renewable energy source. This would give effect to the real benefits associated with a capacity addition or efficiency improvements to an existing hydropower facility. If one limited the Class I benefits to the increase in capacity only, then that would effectively render the use of "efficiency improvements" under Subsection 11F(c) meaningless and unrealizable. Further, including efficiency improvements as qualifying for Class I is consistent with the Energy Policy Act of 2005, which applies tax credits for "incremental production gains from efficiency improvements or capacity additions to existing hydroelectric facilities placed into service after August 8, 2005…"[11]

As such, TCPM recommends that the Department through its regulations clarify that any verifiable incremental increase in energy attributable to efficiency improvements at a hydropower facility (ie. through upgrades in equipment or otherwise) qualifies as a Class I renewable energy source even if the capacity of that facility has not been increased.

---

[9] Sections 3.14, 3.23 (v) and Section 3.23 (vi) of the Rules and Regulations Governing the Implementation of a Renewable Energy Standard (July 25, 2007) promulgated pursuant to Renewable Energy Standards, Section 39-26-1 et. Seq. of the General Laws of Rhode Island

[10] See *Sutherland Statutes and Statutory Construction* (2A Sutherland Statutory Construction § 46:5 7th ed.), quoting from various sources: "If doubt or uncertainty exists as to the meaning or application of a statute's provisions the court should analyze the act in its entirety and harmonize its provisions in accordance with legislative intent and purpose"; "If the comparison of one clause with the rest of the statute makes a certain proposition clear and undoubted the act must be construed accordingly and ought to be so construed as to make it a consistent whole. If after all it turns out that that cannot be done, the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail."

[11] FERC Instructions, supra note 8, at iii.

We appreciate this opportunity to comment on the RPS Provisions and hope our comments have been helpful.

Sincerely,

TRANSCANADA POWER MARKETING LTD.

"*signed*"

Thomas Hwang
Senior Legal Counsel

cc: Michael E. Hachey, Vice President
Tonya Murphy, Legal Dept.